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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THANE INTERNATIONAL, INC., *et al.*,

Petitioners,

v.

JOSEPH J. MILKOWSKI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners have presented compelling reasons to grant the petition, where the Ninth Circuit's opinion reversing the district court and remanding this action for further proceedings is not a final order and petitioners failed even to suggest any argument supporting interlocutory review.

2. Whether petitioners have presented compelling reasons to grant the petition on the basis that the Ninth Circuit exceeded its authority under Fed. R. Civ. P. 52(a) where it simply applied the applicable rule of law to uncontested facts.

3. Whether petitioners have presented compelling reasons to grant the petition where the Ninth Circuit's holding that the misrepresentations were material does not conflict with a decision of this Court, involve a split in the circuits, or implicate a Federal question that has not been settled by this Court.

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INTRODUCTION

Petitioners have not presented any compelling reasons for their petition for a writ of certiorari to be granted. *See* Sup. Ct. R. 10. Although the Ninth Circuit directed judgment in favor of respondents, it also remanded the action for further proceedings, including a determination of loss causation. There is no mention, much less discussion, in the petition of the lack of finality of the Ninth Circuit's decision. The petition should be denied as premature.

There are no compelling or extraordinary legal issues raised in the petition. Petitioners' argument that the Ninth Circuit's opinion conflicts with prior holdings of this Court regarding the application of Fed. R. Civ. P. 52(a) is premised on petitioners' contention that the Ninth Circuit dissembled when it articulated the standard of review it employed. Petitioners' disparagement of the Ninth Circuit is gratuitous, as the Ninth Circuit merely applied the correct legal standard to undisputed facts.

Petitioners contest the Ninth Circuit's determination that the district court should first have determined that the stock traded in an efficient market before relying on reported stock prices to find lack of materiality in an action brought under the securities laws. The Ninth Circuit simply corrected the district court's failure to apply controlling precedent to uncontroverted facts. Specifically, there is no dispute where, when, and by whom the misstatements at issue were made or that Thane's stock did not trade in an efficient market. After trial, the district court itself

concluded that the stock did not trade efficiently. The issue faced by the Ninth Circuit turned on whether it was appropriate for the district court to disregard uniform precedent as to when reported trading prices are determinative. There is no split between the Second and Ninth Circuits or any other Court of Appeals on the applicability of the efficient market theory in determining the materiality of a misstatement.

The Ninth Circuit's materiality holding is consistent with numerous decisions across the country which have analyzed the issue of market efficiency in the context of determining the propriety of utilizing the fraud-on-the-market presumption of reliance. Given that the Ninth Circuit's opinion corrected what the district court perceived was a foray into "unchartered waters," petitioners' contention that there is a circuit split strains credulity.

As neither the district court nor Ninth Circuit found that the stock at issue traded in an efficient market, petitioners' arguments with respect to an alleged circuit split with respect to the relationship between price and materiality in an efficient market is a *non sequitur* and should be disregarded. (*See* Petition at 34-39.) The issue before the Ninth Circuit was not the appropriate time within which a particular stock should react to news in an efficient market, *i.e.*, the degree of market efficiency, but whether one could look at reported trading prices in the absence of an initial finding of market efficiency.

STATEMENT OF THE CASE

Respondents (plaintiffs below) are former stockholders of Reliant Interactive Media Corp. ("Reliant"). Reliant was acquired by defendant Thane International, Inc. ("Thane") in a stock-for-stock merger. Petitioners – Thane and Thane's four principal executive officers, three of whom were also directors of Thane – are defendants below.

Respondents allege in their complaint that the combined proxy statement- prospectus used by petitioners (a) to induce a favorable vote by Reliant stockholders on the proposal to merge with Thane, and (b) to register the shares of Thane stock to be exchanged for Reliant stock in the event of a favorable vote, contains numerous materially misleading statements with respect to the market in which the newly-issued Thane stock would trade following the merger. Respondents allege that the proxy statement-prospectus represented that Thane's stock would trade on the National Association of Securities Dealers' National Market System ("NMS") but, despite the stock qualifying for listing on the NMS, defendants caused Thane's stock to trade on the over-the-counter market's bulletin board (the "OTCBB"). The complaint sets forth a claim for violation of Section 12(a)(2) of the Securities Act of 1933, as amended, 15 U.S.C. § 77l(a)(2), against all defendants, and a control person liability claim pursuant to Section 15 of the same Act, 15 U.S.C. § 77o,

against each of the four individual defendants. Respondents seek rescissory damages pursuant to Section 12(a)(2).[1]

Procedural History

Respondents filed their complaint in the Superior Court, Riverside County, on September 23, 2002. On October 23, 2002, petitioners removed this action to the United States District Court for the Central District of California. Petitioners' motion to dismiss was denied by order entered June 26, 2003, respondents' motion for class certification was granted by order entered November 3, 2004, and cross-motions for summary judgment were granted in part and denied in part by order entered March 4, 2005.

A bench trial was held on April 12 and 13, 2005 and closing arguments made on April 14, 2005. By decision entered June 2, 2005, the district court ruled in favor of petitioners. The district court held for petitioners because it found that (a) the alleged misrepresentations were technically truthful, and (b) even if the statements in question were actionable, they were not material. The district court, despite concluding that Thane's stock did not trade in an efficient market,[2] went on to hold that

1. Accordingly, this is not "an action for money damages" as characterized by petitioners in their second of two Questions Presented. Petition at i. The equitable nature of this action underlied petitioners' motion "to strike plaintiffs' request for a jury trial." Petition at 10.

2. The district court found that "[t]here is little doubt that Thane stock would not meet the tests for an efficient market (Cont'd)

"[i]f the Court factors in the price effect, the Court believes that listing on the NMS was not a material fact." Pet. App. at 87a. The sole basis of the district court's finding a lack of materiality was its reliance on the reported trading prices of Thane's stock on the OTCBB immediately after the merger. Such reliance on reported trading prices in the absence of first finding that Thane's stock traded in an efficient market was unprecedented and contrary to uniform analogous precedent. The district court candidly acknowledged that by relying solely on reported prices on the OTCBB to support a finding of materiality, it was "proceed[ing] into unchartered waters." Pet. App. at 89a. The district court also candidly acknowledged that it was not applying the reasoning of a seminal decision with regard to efficient markets, *Cammer v. Bloom*, *supra*, as it held that "[t]here is little doubt that Thane stock would not meet the tests for an efficient market under *Cammer*." *Id.* at 90a n.11. The district court further acknowledged that the Ninth Circuit follows *Cammer*. Pet. App. at 89a.

The district court framed the issue thus: "can one even assess the price effect in Thane given that it did not trade in an efficient market?" Pet. App. at 88a. This is purely an issue of law. The district court answered

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(Cont'd)

under *Cammer* [*v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989)]. Volume was relatively modest after the merger. For nearly a month, Thane had only one or two market makers. Thane was not followed by any analysts. Thane did not qualify for using SEC Form S-3. The only *Cammer* factor present to any significant degree is the empirical fact that the stock reacted to some events, such as earnings reports." Pet. App. at 90a n.11.

the question in the affirmative without citing any authority in support of its decision to rely on Thane's reported market price. All analogous authority, including that of the Ninth Circuit, is to the contrary.

Final judgment was entered on June 10, 2005 and respondents timely filed a notice of appeal on July 11, 2005. None of the issues raised on the appeal involve disputed issues of fact. The district court noted "the substantial factual stipulations which the parties made in the Pretrial Conference Order." Pet. App. at 63a.

The Ninth Circuit reversed, directed judgment in favor of respondents, and remanded for further proceedings on loss causation and other matters. Petitioners sought a rehearing and suggestion of rehearing *en banc* in which they stated, among other things, that "an appellate court [should] not reverse a factual determination unless it comes away with a 'definite and firm conviction' that an error has been made." Petition For Rehearing and Suggestion of Rehearing *En Banc* at 16. The petition for rehearing and suggestion of rehearing *en banc* was presented to the entire Ninth Circuit and, as no active judge requested a vote on whether to rehear the matter, the petition was denied.

At the same time, the Ninth Circuit issued an amended opinion. After analyzing the language at issue, the Ninth Circuit found, based largely on uncontroverted documentary evidence, that petitioners

misrepresented where Thane's stock would trade.[3] The Ninth Circuit then restated, verbatim, its original express finding that it had a "'definite and firm conviction that a mistake has been committed.'" Pet. App. at 19a and 48a (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)). The Ninth Circuit also found that the misrepresentations were material. Specifically, the Ninth Circuit found that the district court's consideration of "the movement in share price of a stock that did not trade on an efficient market to determine materiality under the circumstances of this case" was clear error. Pet. App. at 20a. Here, as well, all of the evidence upon which the Ninth Circuit relied was undisputed. In rendering its decision, the Ninth Circuit even "accept[ed] as true all of [petitioners' expert's] testimony" on the materiality issue thereby conclusively demonstrating the absence of any disputed factual issues. Pet. App. at 25a. On the issue of materiality, as well, the Ninth Circuit applied Fed. R. Civ. P. 52(a)'s "clear error" standard. Pet. App. at 20a.

Background Facts

Thane and Reliant executed a merger agreement on November 21, 2001, which agreement was amended in December 2001. Section 7.2(a) of the merger agreement made Reliant stockholder approval a condition precedent to the merger, while Section 2.8 provided that, upon consummation of the merger,

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3. Oral testimony could not be of any use to petitioners as they also believed that they were representing that Thane's stock would be listed on the NMS. This is evident as petitioners required Reliant and Reliant's principal stockholders to waive, in writing, the requirement to list on the NMS. Pet. App. 87a n.10.

Reliant stock would be converted into Thane stock at a specified exchange ratio.

In order to satisfy Federal and state law implicated by the proposed merger, Thane filed a registration statement with the Securities and Exchange Commission ("SEC") on January 3, 2002, and filed amendments thereto on February 21, 2002, March 29, 2002, April 23, 2002, and finally on April 26, 2002, when the registration statement was declared effective by the SEC. The proxy statement-prospectus, which is part of the registration statement, was distributed to Reliant stockholders. The registration statement served a dual purpose: the proxy statement portion of the registration statement was required in order to provide information to Reliant's stockholders concerning the proposed merger sufficient to enable them to cast an informed vote; the prospectus portion of the registration statement was necessary in order to register the shares of Thane to be exchanged for Reliant stock upon approval of the merger by Reliant's stockholders.

Prior to the merger, Thane's stock was not publicly traded. The proxy statement-prospectus was replete with various representations concerning where Thane's stock would be listed following the merger.[4] For example,

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4. Contrary to the assurances made by petitioners to this Court, the single representation reprinted in the petition is not "illustrative" of all of the representations and which representations are not "substantially similar" to one another. Petition at 7 and 7 n.2. Particularly significant is the failure of petitioners to discuss the representations concerning liquidity, quoted below, especially as these were of obvious importance to the Ninth Circuit in finding clear error. *See* Pet. App. at 28a-29a.

the proxy statement-prospectus stated as follows, beginning with its cover page:

> The shares of Thane common stock to be received by the stockholders of Reliant in connection with the merger have been approved for quotation and trading on the NASDAQ National Market upon completion of the merger, subject to Thane's compliance with the minimum bid price requirements of $5.00 per share.

"Similar statements appear elsewhere." Pet. App. at 67a n.2.

In the section entitled "Summary of Proposed Merger," which appears at the beginning of the proxy statement-prospectus, petitioners made the following representations:

> The combined company is expected to meet the initial listing requirements of the NASDAQ National Market, which would provide the Reliant stockholders with greater liquidity than they have with Reliant common stock trading on the over-the-counter market.
>
> The Thane common stock to be issued in connection with the merger has been approved for quotation and trading on the NASDAQ National Market upon the completion of the merger, subject to Thane's

> compliance with the minimum bid price requirements of $5.00 per share.

Pet. App. at 67a.

The "Questions And Answers About The Merger" section of the proxy statement-prospectus, the purpose of which is to distill the most important aspects of the transaction and present them in plain English, also focused on NMS listing:

> Q: Will Reliant continue as a public company if the merger agreement is approved?
>
> A: No. Reliant will become a wholly-owned subsidiary of Thane upon the completion of the merger, and Reliant stockholders will become holders of Thane common stock. Thane has received approval for quotation and trading of its common stock on the NASDAQ National Market upon completion of the merger, subject to Thane's compliance with the minimum bid price requirements of $5.00 per share.

Pet. App. at 67a-68a.

Reliant stockholders were told the following under the heading "Reliant's Reasons for the Merger":

> The combined company is expected to meet the initial listing requirements of the NASDAQ National Market, which would provide the Reliant stockholders with greater

> liquidity than they have with Reliant common stock trading on the over-the-counter market.

Pet. App. at 68a.

Under the heading "Per Share Market Price Information," petitioners represented as follows:

> The Thane common stock to be issued in connection with the merger has been approved for quotation and trading on the NASDAQ National Market upon the completion of the merger, subject to Thane's compliance with the minimum bid price requirements of $5.00 per share.

Pet. App. at 5a.

Reliant stockholders were also provided a copy of the merger agreement as part of the proxy statement-prospectus. Section 6.5(b) of the merger agreement discusses listing under "Covenants of Thane":

> Thane shall use commercially reasonable efforts to cause its outstanding Thane Common Stock immediately after the Merger to be approved for quotation on the NASDAQ National Market System or, in Thane's reasonable discretion, another national securities exchange, subject to official notice of issuance, as promptly as practicable after the date hereof, and in any event prior to the Effective Time.

Pet. App. at 68a-69a. Thane was required, as a condition precedent to Reliant's obligation to consummate the merger, to have "'complied in all material respects with all covenants.'" Pet. App. at 69a. By letter dated April 9, 2002, prior to the merger closing, Thane was notified that its application to list its securities on the NMS was approved. In addition, Thane's stock also met the minimum $5.00 per share bid requirement, the only remaining condition precedent to listing. Nevertheless, "Thane's stock was never listed for trading on the NASDAQ National Market System." Pet. App. at 105a. There is nothing in the proxy statement-prospectus that even suggests that Thane reserved the right voluntarily to list on the OTCBB rather than the NMS.

Notwithstanding the representations set forth in the proxy statement-prospectus and quoted above, Thane's decision not to list on the NMS was concealed from Reliant's public stockholders prior to its merger with Thane. The decision not to list, however, was not concealed from Reliant's principal stockholders. Rather, that the parties (including the petitioners) attached great importance to the requirement to list on the NMS is evident by the fact that petitioners required Reliant and Reliant's principal stockholders to execute a written waiver of Thane's contractual obligation to list its shares on the NMS. Pet. App. at 87a n.10.

The Thane-Reliant merger was consummated on May 24, 2002, at which time Thane's stock began trading on the OTCBB. Pet. App. at 69a. Thane did not publicly explain the reason for its stock trading on the OTCBB, rather than the NMS, for approximately ten weeks thereafter. As described by the Ninth Circuit, Thane

stockholders "experienced a wild ride." Pet. App. at 7a. Finally, on August 14, 2002, Thane filed its Quarterly Report on SEC Form 10-Q for its quarter ended June 30, 2002, which, for the first time, publicly disclosed that petitioners intentionally opted not to list Thane's stock for trading on the NMS:

> In May and June of this year, we met with our investment bankers to discuss an underwritten public offering of our common stock. Our investment bankers advised us that we could potentially obtain more favorable pricing for the public offering if we implemented our move to the NASDAQ National Market in conjunction with the underwritten public offering. Over the course of June and July we have been preparing for the public offering, but we have recently concluded that present market conditions are no longer favorable for an underwritten public offering of common stock. As such, we are currently evaluating the listing of our common stock on a national market.

Pet. App. at 70a-71a. Remarkably, this more or less contemporaneous statement fails to even mention a pivotal April meeting which the district court found is the time when the decision not to list was made. Pet. App. at 65a-66a.

After Thane's stock's reported price quickly plunged from a high of $8.50 per share, petitioners took advantage of the bargain price of Thane's stock they

created by squeezing out the former Reliant public stockholders in a going-private transaction at $0.35 per share. Pet. App. at 71a.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS PREMATURE

Inexplicably, petitioners are silent concerning the fact that they are asking this Court to exercise jurisdiction over a non-final order.[5] Petitioners can neither demonstrate extraordinary inconvenience nor present a fundamental issue worthy of review prior to the conclusion of these proceedings that would warrant this Court to depart from its long-standing policy of declining consideration of non-final orders. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)(Lack of finality "itself alone furnished sufficient ground for the denial of the application."); *Office of Senator Mark Dayton v. Hanson*, 127 S. Ct. 2018, 2021 (2007) (Denying petition for certiorari where there are, *inter alia*, no "special circumstances that justify the exercise of . . . discretionary certiorari jurisdiction" of an interlocutory order.).

This Court has long declined the invitation to review interlocutory decisions. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) ("We generally

5. Petitioners' description of the Ninth Circuit's decision (Petition at 13) refers only to the reversal of the judgment in favor of petitioners and ignores the remand to address loss causation and other issues.

await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., concurring); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967)("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

This Court is mindful that review of non-final orders can result in unnecessary delay, costs, and inconvenience. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). Petitioners have failed to demonstrate either "extraordinary inconvenience and embarrassment in the conduct of the cause," *Am. Constr. Co. v. Jacksonville T&K. W. Ry. Co.*, 148 U.S. 372, 384 (1893), or presented an issue that is "fundamental to the further conduct of the case," *United States v. Gen. Motors Corp.* , 323 U.S. 373, 377 (1945).

The Ninth Circuit's opinion reversing the district court's decision also remanded this action to the district court. The district court has yet to rule on damage issues or whether petitioners have met their burden of proving their affirmative defense of lack of loss causation. Any further delay only prejudices the respondents. Petitioners have already availed themselves of *en banc* consideration by the Ninth Circuit.

The Ninth Circuit's ruling on materiality cannot be said to constitute a ruling "fundamental to the further conduct of the case" insofar as the trial has been completed and the record closed. Only in circumstances where the issue sought to be reviewed by writ of certiorari affects the further conduct of the *trial* of issues necessary to the resolution of the merits of the

claims asserted in an action will the exercise of certiorari be warranted. *See Gillespie*, 379 U.S. at 153-54 (discussing cases granting writs of certiorari "where, as here, the case had not yet been fully tried"); *Gen. Motors*, 323 US. at 377 (granting certiorari where issue concerning offer of proof required clarification prior to further conduct of trial); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 (1949) (granting certiorari where issue would affect further trial proceedings); *Land v. Dollar*, 330 U.S. 731, 734 (1947) (granting certiorari where Court of Appeals reversed and remanded for trial).

As discussed herein, while respondents do not believe that the petition presents any compelling interests that would warrant consideration by this Court, the petition, in any event, is premature. Respondents submit that petitioners' failure to even attempt to substantiate the extraordinary relief of review of a non-final order should in and of itself be grounds for denial of the petition.

II. THE RELEVANT FACTS WERE NOT IN DISPUTE AND THE NINTH CIRCUIT APPLIED THE APPROPRIATE CLEAR ERROR STANDARD UNDER FED. R. CIV. P. 52(a)

Petitioners' contention that the Ninth Circuit failed to follow the requirements of Fed. R. Civ. P. 52(a) is premised on their suggestion that the Ninth Circuit dissembled when it articulated its standard of review. Petition at 5 and 25-26. Petitioners even advance a "gotcha moment." Petitioners think it telling that the Ninth Circuit's holding on materiality refers to

"the circumstances of this case." Petition at 26. As is clear from the district court's opinion, however, "the circumstances of this case" consist of undisputed evidence and the district court's error was not in its fact finding but in its application of the law to the undisputed facts.

Initially, the Ninth Circuit, relying on *Easley*, 532 U.S. at 242, held that after examining the documentary record, we have a "'definite and firm conviction that a mistake has been committed,'" and held that the statements in question were false and misleading.[6] The Ninth Circuit, on the issue of materiality, then held that the district court "erred when it considered the movement in share price of a stock that did not trade on an efficient market to determine materiality under the circumstances of this case." Pet. App. at 20a. It went on to hold that "[t]herefore, its conclusion that Thane International's misrepresentations were immaterial is clear error." *Id.* Stated another way, the Ninth Circuit corrected the district court's mistake of law and then discussed the undisputed evidence contained largely in SEC filings and written trial declarations that were submitted in advance of the bench trial and that supported its conclusion.

The district court's decision itself, makes it clear that the Ninth Circuit's reversal of the materiality prong

6. The petition does not seriously challenge this prong of the Ninth Circuit's holding. As set forth *supra*, the oral testimony could not have been of any aid to petitioners as petitioners required Reliant and its principal stockholders to waive NMS listing, thereby demonstrating their own belief that they had represented that Thane would list on the NMS. *See* Pet. App. at 87a n.10.

of the district court's decision was based on the application of correct legal principles to uncontested facts. The district court candidly stated that "without regard to price effects," it "would find that listing on the NMS is marginally material." Pet. App. at 86a. The district court went on to acknowledge that in considering the reported trading prices of a stock which clearly did not trade in an efficient market, "the Court admittedly proceeds into unchartered waters." Pet. App. at 89a. The Ninth Circuit emphasized the lack of factual issues by noting that "[e]ven accepting as true all of [petitioners' expert's] testimony, there is no factual dispute between the experts that [NMS] listing carries objective benefits that directly and positively affect corporate earnings, investor returns, and a stock's pool of potential shareholders." Pet. App. 25a.

While petitioners take issue with the Ninth Circuit's citation to *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), they do not (and cannot) point to any disputed evidence that forms the basis of the Ninth Circuit's holding. Instead, petitioners' entire argument on the perceived error under Fed. R. Civ. P. 52(a) is nothing more than a narration of cases that preceded and followed this Court's decision in *Easley*. *See* Petition at 16-22. The Ninth Circuit held unequivocally that the "clearly erroneous" standard applies to all factual findings and applied the most recent pronouncements of this Court. Pet. App. at 11a, 18a-19a, 20a, and 29a.

Petitioners' attempt to create disputed factual findings by the Ninth Circuit is unavailing. The Ninth Circuit's holding turned on the applicability of the efficient market theory in determining materiality, the

case law on which subject the district court consciously disregarded. It is not, as petitioners suggest, that the Ninth Circuit suddenly "favored" one expert over the other (Petition at 27) but rather that petitioners' expert, at petitioners' direction, disregarded binding *legal* precedent without presenting any contrary *factual* arguments. To the extent the Ninth Circuit credited plaintiffs' expert, that testimony, as well as the facts underlying it, were unrefuted. *See, e.g.*, Pet. App. at 27a ("Preston's uncontested testimony"). Again, it was the application of law to the uncontroverted facts which triggered the reversal of the district court. To support their argument that the Ninth Circuit's opinion conflicts with decisions of this Court and other Circuits, petitioners disregard the Ninth Circuit's unequivocal statement that it applied the Rule 52(a) "clear error" standard and do nothing short of accusing the Ninth Circuit of misrepresenting the nature of its own opinion. Petition at 16.

The supposed intra-circuit split in the Fifth Circuit is based on a strained reading of *McFarland v. T.E. Mercer Trucking Co.*, 781 F.2d 1146, 1148 (5th Cir. 1986). *McFarland* concluded that the district court's review of testimony (deposition) should be upheld unless clearly erroneous. *Id. Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 228 (5th Cir. 1997) also applied the clearly erroneous standard. So did the Ninth Circuit in *Thane*.

The litany of decisions cited by petitioners from the First, Fourth, and Ninth Circuits, concededly occurred in a variety of inapposite procedural contexts, and all

utilized the "clearly erroneous" standard.[7] Petition at 18-20. Petitioners' argument that there is some confusion in the application of Fed. R. Civ. P. 52(a) is based almost verbatim on the 1985 Advisory Committee Notes while at the same time giving short shrift to this Court's opinion in *Easley, supra*, decided long after the 1985 amendment to Rule 52(a). An examination of the underlying facts of these cases suggests that *Easley*, which was followed by the Ninth Circuit (Pet. App. at 19a), like the case at bar, involved primarily documentary and expert evidence, and credibility played a "minor role" (532 U.S. at 243). Petitioners attempt to distinguish *Easley* by claiming that it involved a "constitutional" issue, notwithstanding that *Easley* and the Ninth Circuit's decisions are consistent with Rule 52(a).

III. THE NINTH CIRCUIT APPLIED WELL-ESTABLISHED PRECEDENT REGARDING MARKET EFFICIENCY

A. The Circuit Precedents Are Uniform

The district court held that, "without regard to price effects," the representations concerning listing on the

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7. For example, petitioners' reliance on *Alexander Proudfoot Co. World Headquarters v. Thayer*, 877 F.2d 912, 916 (11th Cir. 1989) is baffling as the issue there was the propriety of a granting of a *dismissal motion* based on personal jurisdiction involving a *de novo* review of the complaint and affidavits. In *Padilla-Manqual v. Pavia Hosp.*, 516 F.3d 29 (1st Cir. 2008), the court reversed the dismissal for lack of jurisdiction and remanded for an evidentiary hearing to hear testimony to insure that a complaint was not dismissed without the opportunity to be heard. *Id.* at 34.

NMS would be "marginally material." Pet. App. at 86a. The district court candidly acknowledged that by relying solely on reported prices in an inefficient market to support a finding of immateriality, it was proceeding "into unchartered waters." Pet. App. at 89a. The district court also candidly acknowledged that it was not applying the reasoning of the seminal decision with regard to efficient markets, *Cammer*, *supra*, as it held that "[t]here is little doubt that Thane stock would not meet the tests for an efficient market under *Cammer*." Pet. App. at 90a n.11.

The district court asked: "can one even assess the price effect in Thane given that it did not trade in an efficient market?" Pet. App. at 88a. This is purely an issue of law. The district court answered the question in the affirmative without citing any authority in support of its decision to rely on Thane's reported market price exclusively. All analogous authority is to the contrary.

The issue of market efficiency typically arises in the context of a putative class seeking to avail itself of the "fraud-on-the-market" presumption of reliance in connection with class certification. In order to eliminate reliance as an individual issue in securities fraud actions, a putative class usually seeks to establish reliance based upon a security's reported trading prices, *i.e.*, the "market," contending that the conduct in question constitutes a fraud-on-the-market. A determination that reliance is an individual issue would preclude the necessary Fed. R. Civ. P. 23(b)(3) finding "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . ." *See Basic Inc. v. Levinson*, 485 U.S. 224,

242 (1988) ("Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones.").

Quoting from a Third Circuit decision, this Court in *Basic Inc.* defined the fraud-on-the-market presumption as being "'based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . .'" 485 U.S. at 241. The most widely accepted test for determining whether there is an "open and developed" (*i.e.*, "efficient") securities market, is that articulated in *Cammer*. The *Cammer* court enumerated five factors as particularly relevant to determining whether the market for a particular stock is efficient: (1) the stock's average weekly trading volume; (2) the number of security analysts who follow the stock; (3) the existence of market makers and arbitrageurs active in the stock; (4) eligibility to file an SEC Form S-3 registration statement (eligibility for which is limited to large, well-known, and seasoned issuers); and (5) facts demonstrating a cause-and-effect relationship between unexpected corporate developments and an immediate stock price response. 711 F. Supp. at 1286-87. The Ninth Circuit, in *Binder v. Gillespie*, 184 F.3d 1059 (9th Cir. 1999), endorsed reliance on the *Cammer* factors, noting that they "are designed to help make the central determination of efficiency in a particular market." *Id.* at 1065.

Particularly relevant to this action is *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005), in which the Fifth Circuit analyzed, in considerable depth, the issue of market efficiency in the context of a stock which traded on the OTCBB and where plaintiffs were seeking the benefit of the fraud-on-the-market presumption of reliance. The Fifth Circuit held that "[w]ithout an initial demonstration of market efficiency, there is no assurance that the available material information concerning the stock translates into an effect on the market price and supports a classwide presumption of reliance." 401 F.3d at 322. Here, not only was there no "initial demonstration of market efficiency," there never was any demonstration of market efficiency as respondents' expert opined that the market was inefficient and petitioners' expert avoided making any assumption on whether Thane's stock traded in an efficient market in either of his two reports.

In performing its market efficiency analysis, the court below did not use the correct standard of market efficiency. The First Circuit's decision in *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1 (1st Cir. 2005), contains a comprehensive analysis of the concept of market efficiency. The First Circuit defined an efficient market as "one in which the market price [of the stock] *fully reflects all* publicly available information." *Id.* at 12. (Emphasis in original). It rejected the lower court's definition which focused "on the general consideration by market professionals of *most* publicly announced material statements about companies." *Id.* (Emphasis in original.) Here, the district court did not even consider whether the price of Thane's stock reflected "*most* publicly announced material statements" (*id.* at 14;

emphasis in original); its analysis was limited to whether Thane's stock's price reflected one fact and one fact only – that it was not trading on the NMS.

On the same day as it issued its *PolyMedica* decision, the First Circuit applied the standard of market efficiency adopted in its decision in *PolyMedica* to its decision in *In re Xcelera.com Sec. Litig.*, 430 F.3d 503 (1st Cir. 2005). In affirming the district court, the First Circuit endorsed "the district court's reliance upon *Cammer* to determine whether the Xcelera market was efficient." *Id.* at 508.

The district court here acknowledged that "[t]here is little doubt that Thane stock could not meet the tests for an efficient market under *Cammer*." Pet. App. at 90a n.11. Nevertheless, the district court concluded "that Thane had the ability to impound the fact of non-listing fairly promptly." *Id.* Without reference to any authority, the district court "perceived" its duty in analyzing market efficiency at the trial stage to be less rigorous than a court examining market efficiency at the class certification stage. Pet. App. at 89a. The only explanation the district court gave was a reference to "sweeping due process consequences" of class certification. *Id.* It is counterintuitive to presume that the standard used by the trier of fact to determine materiality would be weaker than the standard used by a court determining whether a class should be certified at the initial stages of the litigation. Although the reason for ascertaining market efficiency here is different than in *Cammer*, *Binder*, *Unger*, *PolyMedica*, and *Xcelera*, the district court was dealing with the same market having the same mechanism for converting information into price. If the

market mechanism is found deficient in the context of a plaintiff seeking class certification, the same deficiencies should prevent a defendant from escaping the consequences of its misrepresentations because the reported prices in an inefficient market did not immediately drop.

The district court's approach to the issue of the relevance of the reported prices of Thane's stock is not typical. "When legal precedent is available, I follow it, not economic or academic literature." *In re PolyMedica Corp. Sec. Litig.*, 224 F.R.D. 27, 41 (D. Mass. 2004). The *PolyMedica* approach has the benefit of support in the precedent from this Court:

> We need not determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory. For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices.

Basic Inc., 485 U.S. at 247 n.24. Here, there is no dispute that "market professionals" had little, if any, interest in Thane's stock. Thane's stock was not followed by any analysts or arbitrageurs, and there were few market makers. Pet. App. at 90a n.11. Although it may have been known that Thane was trading on the OTCBB shortly after the merger, there is no evidence that there were sufficient market mechanisms available to translate

that knowledge into price. The focus of *Cammer* and *Unger* is to identify such mechanisms (*e.g.*, volume, analyst following, multiple market makers, market capitalization, etc.) and verify their existence prior to relying on reported market prices. The district court chose to ignore the absence of these market mechanisms and thereby committed clear error by relying on the reported OTCBB prices generated in a demonstrably inefficient market.

B. There Is No Split Between The Second and Ninth Circuits Regarding The Use Of Price In Cases Where The Stock Is Inefficient

Petitioners' sole authority in support of its theory that a court could look to price in determining materiality in the absence of a finding of an efficient market for a stock is *Akerman v. Oryx Commc'ns, Inc.*, 609 F. Supp. 363 (S.D.N.Y. 1984), *aff'd*, 810 F.2d 336 (2d Cir. 1987), a case which was decided before the "efficient market theory" was explicated in *Cammer*, *supra*. The efficient market analysis of *Cammer* was endorsed by the Ninth Circuit in *Binder*, 184 F.3d at 1065, and explicitly rejected by the district court in its opinion resulting in the reversal. The district court candidly acknowledged by not following *Cammer* and *Binder*, it "proceeds into unchartered waters." Pet. App. at 89a. Inexplicably, petitioners do no bother to cite to *Cammer* or *Binder* in their petition.

The efficient market theory explicated in *Cammer* is likewise the standard in the Second Circuit as evidenced by numerous decisions decided after *Akerman*. Any alleged split in the Circuits is thus

illusory. In *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006), the Second Circuit relied on the Sixth Circuit's analysis of market efficiency in *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990), which is premised on *Cammer*. *See also In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp. 2d 556, 574 n.24 (S.D.N.Y. 2008) (relying on the *Cammer* factors to determine whether the market for shares was efficient).

Significantly, in *Akerman*, there is no discussion of the efficient market hypothesis and materiality and efficiency essentially were presumed.[8] 810 F.2d at 341. Implicit in the Second Circuit's acknowledgment that the price of the stock rose in reaction to the disclosure of the misstatement was the reliance on the propriety of the stock price. *Akerman*, 810 F.2d at 343. In *Akerman*, both plaintiffs and defendants relied on the price of the stock and the district court noted that the case was "far from one of monumental significance." 609 F. Supp. at 366. The only relevance *Akerman* has to the case at bar is the Second Circuit's refusal to take jurisdiction over interlocutory issues. 810 F.2d at 339-40.

C. The Ninth Circuit's Decision Followed This Court's Precedents

The Ninth Circuit's decision is also consistent with this Court's holdings in *TSC Indus., Inc. v. Northway,*

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8. There is a stray reference by plaintiffs to "the thin market" for the subject stock which reference was found to be "internal[ly] inconsisten[t]" with other positions of plaintiffs. 810 F.2d at 343.

Inc., 426 U.S. 438, 449 (1976), *Basic*, and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1973). *TSC*, sets forth an objective standard for materiality of omissions or misstatements for all Federal securities law purposes: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC*, 426 U.S. at 449. The standard contemplates:

> a showing of a substantial likelihood that, under all circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

Id. Accord Basic, 485 U.S. at 231-32.

The Ninth Circuit's analysis of materiality took into account undisputed facts, accepted as true all of petitioners' expert's testimony (Pet. App. at 25a), and only disagreed with the district court on the issue of the legal consequences of the lack of an efficient market. In *Affiliated Ute*, 406 U.S. at 152-53, this Court ignored the share price holding that the district court "is not restricted to actual sales prices in a market so isolated and so thin as this one." *Id.* at 155. This is precisely what the market for Thane was – isolated and thin.

D. The Ninth Circuit's Opinion Is Well Reasoned

The Ninth Circuit's opinion also is consistent with both modern finance theory and common sense. Petitioners represented that listing on the NMS would increase the liquidity of Thane's stock.[9] One of the main reasons for this is that most institutional investors cannot trade in stocks listed only on the OTCBB. Pet. App. at 27a. It is Economics 101 that a decrease in demand – 48.3% of all equities were owned by institutional investors in 2001 (*id.*) – *i.e.*, lowering the demand curve, results in a lower price.

The concept of different degrees of efficiency presumes the existence of an efficient market that meets the threshold standards of *Cammer*. The very case cited by petitioners supports this proposition. Petitioners cite *Eckstein v. Balcor Film Invs.*, 8 F.3d 1121, 1130 (7th Cir. 1993), for the proposition that "'[e]fficiency' is not an all-or-nothing phenomenon." Yet, the issue in *Eckstein* was whether the market for the partnership units at issue was "efficient." *Id.* The court considered, *inter alia*, that there were no market makers and the units were thinly traded. The *Eckstein* court in effect rejected the "fraud-created-the-market theory" as a substitute for reliance based on the specific circumstances of that case. *Id.*

In order to entice this Court to exercise jurisdiction over the petition, petitioners claim an alleged split in

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9. As the Ninth Circuit pointedly noted, mere "approval [of listing] alone would do absolutely nothing to increase a stock's liquidity." Pet. App. at 15a.

the Circuits concerning the relationship between price and materiality in efficient markets. Petition at 34-35. Again, petitioners simply disregard "the undisputed fact that the newly merged Thane International never did trade on an efficient market." Pet. App. at 29a. Any argument relating to consideration of movements in price in an efficient stock is irrelevant here and not appropriate for review as it is uncontroverted that Thane stock did not trade in an efficient market. Further, petitioners fail to articulate any error committed by the Ninth Circuit in this regard and simply provide a narrative of other circuits' analysis of price in determining materiality.

Seemingly, the issue raised by petitioners is one of timing, *i.e.*, what is the appropriate time within which a stock price must move in reaction to news for it to impact materiality. Implicit in each of the decisions cited by petitioners is the existence or presumption of an efficient market. Interestingly, if one looks beyond the snippets of quoted material and delves into the facts in *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997), there was no real issue on how long it took the stock price to react to the disclosure of negative news; it never reacted. The *Burlington* plaintiffs asserted that the stock was efficient and the disclosures at issue had no effect on the company's stock price. In decisions following *Burlington*, the Third Circuit has made it clear that lack of materiality based on price is predicated on an "efficient market." *See, e.g., In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1330 (3d Cir. 2002).

The distinction noted by petitioners regarding the Fifth Circuit limiting the effect of price in an efficient market to determine reliance and not materiality is irrelevant here as reliance is not an issue. *See Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 415 (5th Cir. 2001).

Finally, the First Circuit's decision in *PolyMedica*, 432 F.3d at 7, defines "efficiency" as the "flow of information in the relevant market and effect of that information on the price of the stock." *PolyMedica* held that an efficient market is "one in which the market price of the stock *fully reflects all* publicly available information." 432 F.3d at 14 (emphasis in original). It has never been alleged even by respondents that the market for Thane stock could reflect "all public information."

Ironically, the Ninth Circuit's view of the efficient market theory is fully consistent with that of petitioners' expert, albeit in testimony in another case. In a Delaware action in which petitioners' expert acted as a trial expert, he ignored the reported trading price of a stock trading on the New York Stock Exchange, which otherwise lacked indicia of efficiency, and opined that it was fair for the expert's client to force a public company that such client controlled to pay $17.75 per share for a stock the reported trading price of which was only $3.70 per share. The district court characterized this testimony as opining that the trading price reported on the New York Stock Exchange "is irrelevant" but failed to apply the same logic to this case. Pet. App. at 86a n.8.

E. The Ninth Circuit's Opinion Will Not Likely Have Any Effect On The Legitimacy Of Bench Trials

Petitioners' argument that the Ninth Circuit's opinion would adversely affect bench trials is both irrelevant and not based on sound legal or empirical data. It is doubtful whether any of the statistical data available would be applicable to securities cases where in recent years there have been only a handful of cases that went to trial. Here, it was petitioners who demanded the commonly believed more defendant-friendly bench trial. Petition at 10. Recent studies have noted the overall decline of civil trials[10] as well as the possible existence of an anti-plaintiff bias at the federal appellate level.[11] In addition, studies have shown higher reversal rates for verdicts reached by juries. *See, e.g.*, Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, Cornell Legal Studies Research Paper No. 07-006, at 3 (Sept. 2007). Suffice it to say, the data offered by petitioners is selective.

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10. Marc Galanter, *A World Without Trials?*, 2006 J. Disp. Resol. 7, at 2.

11. Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in Federal Appellate Courts*, 84 Judicature 128 (2000).

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the petition be denied.

Respectfully submitted,

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